

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-Cv-1297-MJP

**DEFENDANTS' MOTION TO STAY
PRELIMINARY INJUNCTION
PENDING APPEAL**

NOTED FOR CONSIDERATION:
May 18, 2018

INTRODUCTION

On April 13, 2018, this Court entered an order granting in part and denying in part Plaintiffs' and Intervenor Washington's motions for summary judgment, granting in part and denying in part Defendants' motion for partial summary judgment, and striking Defendants' motion to dissolve the preliminary injunction.¹ Mem. Op., ECF No. 233. In its order, the Court expanded its injunction to preclude Defendants other than the President from implementing the Department of Defense's ("DoD") new policy announced on March 23, 2018. *Id.* at 30–31. Defendants subsequently filed a timely notice of appeal, *see* ECF No. 236, and the Court's order is now on appeal before the United States Court of Appeals for the Ninth Circuit.

Defendants now move to stay the Court's preliminary injunction pending appeal, so that the Defense Department can implement its new policy. Unless stayed, the Court's injunction will irreparably harm the government (and the public) by compelling the military to adhere to a policy it has concluded poses substantial risks. A stay, by contrast, would not likely injure any of the plaintiffs, many of whom may continue to serve under DoD's new policy. Defendants are also likely to succeed on the merits of this case because they are defending a professional decision of military leaders, to which significant deference is due. At a minimum, the Court should stay the preliminary injunction insofar as it grants nationwide relief.

ARGUMENT

I. The Court Should Stay The Preliminary Injunction Pending Appeal, So That DoD Can Implement Its New Policy.

Federal Rule of Civil Procedure 62(c) grants district courts discretion to “suspend, modify, restore, or grant an injunction’ during the pendency of the defendant’s interlocutory appeal.” *Mayweathers v. Newland*, 258 F.3d 930, 935 (9th Cir. 2001) (quoting Fed. R. Civ. P. 62(c)). In deciding whether to stay a preliminary injunction pending appeal, district courts consider four factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3)

¹ The Court’s order striking Defendants’ Motion to Dissolve the Preliminary Injunction, without permitting the parties to finish briefing the issues, is understood as a denial of Defendants’ motion.

1 whether issuance of the stay will substantially injure the other parties interested in the proceeding;
 2 and (4) where the public interest lies.” *Doe v. Trump*, 284 F. Supp. 3d 1172, 1178 (W.D. Wash.
 3 2018) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)).

4 To be sure, these are the same factors that governed Defendants’ Motion to Dissolve the
 5 Preliminary Injunction, which the Court recently denied. *See* Mem. Op. 31; *Lopez v. Heckler*,
 6 713 F.2d 1432, 1435 (9th Cir. 1983) (“The standard for evaluating stays pending appeal is similar
 7 to that employed by district courts in deciding whether to grant a preliminary injunction.”). But
 8 courts regularly find cause to stay their own rulings entering, dissolving, or modifying
 9 injunctions. *See, e.g., Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841,
 10 842 (D.C. Cir. 1977) (holding that district court did not abuse its discretion by entering permanent
 11 injunction and then staying it pending appeal); *Thiry v. Carlson*, 891 F. Supp. 563, 567 (D. Kan.
 12 1995) (granting stay pending appeal of court’s own order dissolving preliminary injunction).
 13 Although the Court ruled that its preliminary injunction now covers DoD’s new policy, the Court
 14 should stay its injunction pending Defendants’ appeal, so that the new policy can be
 15 implemented.

16 A stay is critical to prevent irreparable harm to military interests. The nation’s military
 17 leaders have concluded that absent implementation of the new policy, there will remain
 18 “substantial risks” that threaten to “undermine readiness, disrupt unit cohesion, and impose an
 19 unreasonable burden on the military that is not conducive to military effectiveness and lethality.”
 20 Memorandum by Secretary of Defense James Mattis (“Mattis Memorandum”) 2 (Feb. 22, 2018),
 21 ECF No. 216-1; *see also, e.g.,* Department of Defense Report and Recommendations on Military
 22 Service by Transgender Persons (“DoD Report”) 32–35, 41, 44 (Feb. 2018). In their professional
 23 military judgment, departing from the Carter framework is necessary to protect these military
 24 interests. DoD Report 30–32. Such “specific, predictive judgments” from senior military
 25 officials, including the Secretary of Defense himself, “about how the preliminary injunction
 26 would reduce the effectiveness” of the military, merit significant deference. *Winter v. NRDC*,
 27 555 U.S. 7, 27 (2008). The Court’s decision striking Defendants’ Motion to Dissolve the
 28

1 Preliminary Injunction did not grapple with these military judgments. Thus, the Court may still
 2 stay the preliminary injunction pending appeal, so that DoD can implement its new policy.

3 In contrast to Defendants, Plaintiffs face little risk of harm. Many of the individual
 4 Plaintiffs would qualify for the new policy's reliance exception—and thus would be able to
 5 continue serving in their preferred gender, obtain commissions, and receive medical treatment—
 6 because they received a diagnosis of gender dysphoria from a military medical provider while
 7 the Carter policy was in effect. *See* First Am. Compl. ¶¶ 53, 79, 88, 100, 111, ECF No. 30;
 8 Easley Decl. ¶ 3, ECF No. 72; DoD Report 43. These Plaintiffs are thus highly unlikely to sustain
 9 any injury under the new policy.² And as for the remaining Plaintiffs and Washington, although
 10 the Court has determined that they may have satisfied the requirements for Article III standing,
 11 it does not follow that they are likely to suffer an irreparable harm to any significant degree,
 12 especially in comparison to the critical military interests at stake. As Defendants have argued
 13 previously, *see* Defs.' Mot. to Dismiss 16, ECF 69, the individual Plaintiffs seeking to access
 14 into the armed forces have not demonstrated that they have been stable for at least 18 months
 15 post-transition, as required under the Carter policy. And even assuming that the implementation
 16 of the new policy during the appeal would prevent some plaintiffs from accessing, that harm
 17 would only be temporary, lasting at most the length of Defendants' appeal. *Cf. Hartikka v. United*
 18 *States*, 754 F.2d. 1516, 1518 (9th Cir. 1985) (damage to reputation as well as lost income,
 19 retirement, and relocation pay resulting from less-than-honorable discharge not irreparable). For
 20 similar reasons, neither the organizational plaintiffs nor Washington would face harm to any
 21 significant degree. Indeed, while Washington asserts that the new policy would “undermine the
 22 efficacy of its National Guard,” Mem. Op. 19, senior military leaders have studied the issue
 23 extensively and come to the opposite conclusion. Accordingly, the judgment of military leaders

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 25 ² In the Court's decision, it suggested that the record did not support the conclusion that the
 26 current service member Plaintiffs were diagnosed with gender dysphoria by a military medical
 27 provider after June 30, 2016. Mem. Op. 15–16, 15 n.7. But the Court did not address the fact
 28 that service members could receive treatment under the Carter policy—which all of these
 Plaintiffs did—only if they had received a diagnosis of gender dysphoria by a military medical
 provider after that policy took effect. *See* Declaration of Ryan B. Parker, Exh. 1 (Department of
 Defense Instruction 1300.28).

1 is that not implementing the new policy would undermine the readiness and efficacy of the
 2 military—including the Washington National Guard. Mattis Memorandum 2; *see also, e.g.*, DoD
 3 Report 32–35, 41, 44; *cf. Winter*, 555 U.S. 7, 27 (2008) (“The lower courts failed properly to
 4 defer to senior Navy officers’ specific, predictive judgments about how the preliminary
 5 injunction would reduce the effectiveness of the Navy’s SOCAL training exercises.”).

6 The likelihood of success on the merits also favors granting a stay. In the Court’s
 7 decision, it expressly reserved final ruling on the degree of deference that DoD’s new policy
 8 should receive. Mem. Op. at 27. When the Ninth Circuit and/or this Court ultimately address
 9 that question, they are highly likely to conclude that significant deference is appropriate.
 10 Although the armed forces are subject to constitutional constraints, “the tests and limitations to
 11 be applied may differ because of the military context.” *Rostker v. Goldberg*, 453 U.S. 57, 67
 12 (1981). For instance, judicial “review of military regulations challenged on First Amendment
 13 grounds is far more deferential than constitutional review of similar laws or regulations destined
 14 for civilian society.” *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). As one of the many
 15 “complex, subtle, and professional decisions as to the composition ... of a military force, which
 16 are essentially professional military judgments,” *Winter*, 555 U.S. at 24 (quoting *Gilligan v.*
 17 *Morgan*, 413 U.S. 1, 10 (1973)), the Department’s new policy, which simply declines to generally
 18 accommodate gender transition, survives the highly deferential review applicable here. Drawing
 19 on the experience and judgment of senior military leadership, evidence from before and after the
 20 adoption of the Carter policy, and its experience with the Carter policy so far, the Department
 21 concluded that continuing to provide a general accommodation for gender transition would pose
 22 unacceptable risks to military interests. DoD Report 18. The Department’s professional military
 23 judgments on these interests, which involved a sensitive consideration of risks, costs, and internal
 24 discipline, clearly satisfy the deferential form of review required of such determinations.³

25 ³ It is also likely that the Ninth Circuit will disagree with the Court’s conclusion that DoD’s new
 26 policy is subject to strict scrutiny. Mem. Op. 24. As an initial matter, the new policy applies to
 27 a medical condition and its attendant treatment—gender dysphoria and transition—not on the
 28 basis of whether a person is transgender. Yet even if that were not the case, the Court’s decision
 did not cite to a single instance where a court had ruled that a policy that classifies on the basis
 of transgender status was subject to strict scrutiny. *See generally id.* Relatedly, the Ninth Circuit

1 The public interest favors staying the Court’s preliminary injunction as well. The Court’s
 2 previous ruling on the President’s 2017 Memorandum and statement on Twitter hinged on its
 3 belief that the Carter policy had no “documented negative effects.” Order 22, ECF No. 103. That
 4 is no longer accurate. DoD has now detailed the risks associated with the Carter policy and
 5 explained why, in its professional military judgment, it was “necessary” to depart from that
 6 framework. DoD Report 32. Staying the Court’s preliminary injunction pending appeal serves
 7 the public interest by allowing the military to implement the policy that will best serve military
 8 interests, and therefore the security of the public.

9 Finally, at a minimum, the Court should stay the preliminary injunction insofar as it grants
 10 nationwide relief. Under Article III, “[t]he remedy” sought must “be limited to the inadequacy
 11 that produced the injury in fact that the plaintiff has established.” *Lewis v Casey*, 518 U.S. 343,
 12 357 (1996). Likewise, equitable principles require that an injunction “be no more burdensome
 13 to the defendant than necessary to provide complete relief to the plaintiffs.” *Madsen v. Women’s*
 14 *Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). The Court determined that nine individuals have
 15 standing to challenge the new policy. Mem. Op. 15–17. But it did not limit its remedy to their
 16 injuries; instead, it barred implementation of the new policy “nationwide.” *Id.* at 2. A narrow
 17 injunction, barring the application of the new policy to the nine individual plaintiffs, would
 18 provide those plaintiffs with full preliminary relief. *See U.S. Dep’t of Def. v. Meinhold*, 510 U.S.
 19 939 (1993) (staying injunction against military policy to the extent it conferred relief on anyone
 20 other than plaintiff); *Meinhold v. U.S. Dep’t of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994) (vacating
 21 injunction save to the extent it applied to plaintiff).

22 **II. Request For Expedited Ruling**

23 If this Court has not ruled on Defendants’ motion by May 4, 2018, Defendants intend to
 24 file for a stay of the Court’s preliminary injunction with the Ninth Circuit Court of Appeals. If
 25 this Court rules on Defendants’ motion after Defendants’ have filed their motion with the Ninth
 26 Circuit, Defendants will provide the Ninth Circuit with this Court’s ruling.

27 _____
 28 is also likely to reject the Court’s implicit conclusions that Plaintiffs are likely to succeed on the
 merits of their equal protection, substantive due process, and First Amendment claims.

1 Defense counsel has conferred with counsel for both Plaintiffs and Washington regarding
 2 this motion. Washington opposes the motion. Plaintiffs' counsel requested that Defendants
 3 include the following statement of Plaintiffs' position: "Plaintiffs intend to oppose the motion to
 4 stay. Plaintiffs also respectfully request that the Court refrain from ruling on Defendants' motion
 5 until after receiving Plaintiffs' opposition which will be timely filed in accordance with the Local
 6 Rules."

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 8 Dated: April 30, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2018, I electronically filed the foregoing Motion to Stay Preliminary Injunction Pending Appeal using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: April 30, 2018

/s/ Ryan Parker

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